

[Waiver 1992-7]
W-92-36

MEMORANDUM

September 9, 1992

TO: Derick Berlage, Councilmember
Montgomery County Council

FROM: Jay L. Cohen Chair
Montgomery County Ethics Commission

RE: Waiver

The Ethics Commission has reviewed your request for a waiver dated June 30, 1992. The Commission understands that the facts forming the background of your request are as follows:

The Montgomery County Board of Education has identified a 42 acre tract of land located at the intersection of Colesville Road and University Boulevard as a potential site for a new Blair High School. This tract of land is commonly referred to as the Kay Tract. The Kay Tract is currently zoned for residential use but the owner has applied for a zoning change to a mixed residential, commercial, and office use.

The new high school proposed for the Kay Tract would serve almost exclusively students residing within District 5 from which you were elected as a member of the County Council.

Your personal residence, which you own, is located two blocks from the Kay Tract and is separated by eight single-family homes and University Boulevard, which is a six-lane divided highway. You have indicated that you do not know if construction of a high school on the Kay Tract will affect the value of your property.

The Council has previously approved funding for a study on the feasibility of building a new high school on the Kay Tract. You indicate that the Council may be asked to vote in the near future on whether to acquire the Kay Tract and subsequently to approve the construction of a new high school on it.

The Ethics Commission had issued to you an advisory opinion dated June 3, 1992, indicating that you could participate in the Council decision on whether to fund a feasibility study without conflict of interest. The Ethics Commission found that an informational study would not affect, in a manner distinct from the public generally, your property. On the other hand, the Commission concluded that Section 19A-11(a) “prevents you from participating as a Councilmember in any matter that directly affects

the . . . [Kay Tract], including a decision to appropriate funds to acquire the . . . [Kay Tract] or build a high school on it.”¹

The Ethics Commission invited you to provide additional information that would indicate development of a high school on the Kay Tract would have no economic impact on your property or, in the alternative, apply for a waiver under Section 19A-8 if you wished to participate in the decision making process concerning this matter.

Section 19A-8 authorizes the Commission to grant a waiver from the prohibitions of Section 19A-11 if the Commission finds that:

- “(1) The best interests of the County would be served by granting the waiver;
- (2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.”

Your request for a waiver addresses each of these criteria.

In applying the waiver criteria to the facts in this case, the Ethics Commission finds the following facts, many of which you have identified in your request for a waiver, persuasive:

1. The students that would be served by a new high school on the Kay Tract would almost exclusively reside within District 5. Accordingly, the residents of District 5 have a strong and legitimate claim that the Councilmember elected from their District participate in this matter. Therefore, the Ethics Commission concludes that it would be in the best interest of the County for you to participate in this matter.

2. As already noted, there is a strong public policy reason for you to participate in this matter as the Council representative from District 5.

On the other hand, the acquisition of the Kay Tract and construction of a high school on it may affect the value of your property. However, the extent of the impact of these actions on the value of your property, if any, is uncertain. Since the acquisition of the Kay Tract would be for a public purpose, the Ethics Commission concludes that the importance of your participation as a Councilmember in this decision outweighs any actual or potential harm of a conflict of interest.

3. The Ethics Commission is aware of no facts which would support a conclusion that granting you a waiver to participate in this matter would give you an unfair advantage over other members of the public.

Accordingly, the Ethics Commission grants you a waiver to participate in Council discussions and decisions concerning the acquisition of the Kay Tract for a public

¹ Unless otherwise indicated, section references are to the Montgomery County Code (1984).

purpose and construction of a high school on the tract. This waiver is subject to the following conditions:

1. This waiver does not extend to other Council decisions, such as an application for rezoning, which affect the Kay Tract.
2. You must publicly disclose to the Council your receipt of this waiver prior to your initial participation in the consideration of the acquisition of or construction of a high school on the Kay Tract.

If you have any questions regarding this waiver, please contact the Commission.